No. 2636.

United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

GREAT NORTHERN RAILWAY COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

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STATEMENT OF CASE.

This suit consisting of 12 counts was brought against the Great Northern Railway Co. to recover penalties for violations of the safety-appliance act approved March 2, 1893 (27 Stat. L., 531), as amended by the act of April 1, 1896 (29 Stat. L., 85), and as amended by the act of March 2, 1903 (32 Stat. L., 943).

The first count, after alleging that defendant is a common carrier engaged in interstate commerce, states that:

> Said defendant on July 9, 1914, ran on its line of railroad its certain freight train, known as No. 402, drawn by its own locomotive engine No. 1918, said train being run over a part of a through highway of interstate commerce and being then and there engaged in the movement of interstate traffic.

> Plaintiff further alleges that on said date said defendant ran said train as aforesaid over its line of railroad from Cascade Tunnel, in the State of Washington, to Merritt, in said State, within the jurisdiction of this court, when its speed was controlled by the brakemen using the common hand brake for that purpose, and when said defendant did then and there require said brakemen to use the common hand brake to control the speed of said train, and when the speed of said train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing said train, as required by section 1 of the aforesaid act of March 2, 1893, as amended.

Counts Nos. 2 to 12 are identical with count No. 1, except as to dates, train numbers, and engine numbers.

To this complaint, defendant filed its demurrer, assigning three causes therefor:

> That neither said complaint nor any cause of action set forth in said complaint states sufficient facts or grounds constituting an offense against the United States or any offense.
>
> That neither said complaint nor any cause of action therein attempted to be set forth states facts sufficient to constitute a cause or causes of action against the said defendant.
>
> That the facts stated in said complaint and each and every cause of action therein set forth do not state sufficient grounds constituting an offense against the United States or any offense, nor do they state any cause of action under the act of Congress entitled "An act to

promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes and for other purposes,", approved March 2, 1893, as amended April 1, 1896, as amended March 2, 1903, and as amended April 14, 1910.

In addition to the demurrer the following stipulation appears:

> It is stipulated, that in consideration of the demurrer to each of the causes of action herein in this court, or in any appellate proceedings, it may be accepted as a fact as to each of said causes of action that each engine was equipped with a power-driving wheel brake and appliances for operating a train brake system, and that in each train not less than 85 per cent of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. (Rec., p. 18.)

The district court sustained the demurrer and dismissed the action.

The assignments of error are as follows:

> 1. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every clause of action of said complaint, for the reason that it appears from said complaint that said defendant operated

over its line of railroad the train mentioned in each and every cause of action of said complaint, when its speed was controlled by the brakemen using the common hand brake for that purpose.

2. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, and did then and there require the brakemen to use the common hand brake to control the speed of said train.

3. The said district court erred in sustaining the demurrer of the said Great Northern Railway Company to the complaint filed herein by the said United States of America, and to each and every cause of action of said complaint, for the reason that it appears from said complaint that said defendant operated over its line of railroad the train mentioned in each and every cause of action of said complaint, when its speed was not controlled exclusively by the power or train brakes used and operated by the engineer of the locomotive engine drawing said train.

4. The said district court erred in sustaining said demurrer, for the reasons that the matters set forth in each and every cause of action of said complaint constitute a cause of action against said defendant.

5. The said district court erred in rendering judgment in favor of said Great Northern Railway Company and against the said United States of America upon each and every cause of action of said complaint, for the reasons stated in the foregoing assignments of error.

The material part of the act in question is as follows:

THE STATUTE.

(27 Stat. L., 531, approved Mar. 2, 1893; amended by 29 Stat. L., 85, Apr. 1, 1896.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed *without requiring brakemen to use the common hand brake* for that purpose.

* * * SEC. 6 (as amended Apr. 1, 1896). That any such common carrier using any locomotive engine, *running any train,* or hauling or permitting to be hauled or used on its line any car *in violation of any of*

the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered, etc. * * *

AMENDED ACT.

(32 Stat. L., 943, approved Mar. 2, 1903.)

SEC. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; *and all power-braked cars in such train* which are associated together with said fifty per centum *shall have their brakes so used and operated;* and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

1. Use of hand brakes to control speed of trains is unlawful. *Virginian Ry.* v. *United States* (4th C. C. A.; 223 Fed., 748).

2. Legislative history of act indicates that one of the leading purposes of the act was to keep brakemen off the tops of cars moving in trains.

House Report No. 3014, 51st Cong., 1st sess., p. 1, being report of House Committee on Railways and Canals on House bill No. 9682, made Aug. 25, 1890.

House Report No. 1678, 52d Cong., 1st sess., p. 3.

Cong. Rec., Feb. 8, 1893, p. 1381, chairman of Committee on Interstate Commerce, Senator Cullom, explains purpose and scope of bill.

Cong. Rec., Feb. 10, 1893, p. 1500.

11 Ann. Rep. Interstate Commerce Commission, p. 129.

13 Ann. Rep. Interstate Commerce Commission, p. 55.

14 Ann. Rep. Interstate Commerce Commission, p. 78, et seq.

3. The express words in the first section of the act, "without requiring brakemen to use the common hand brakes" in controlling the speed of train, indicates unmistakably the congressional purpose to make such use unlawful. (27 Stat. L., 531.)

4. The later statutory requirement of an efficient hand brake on each car (act of Apr. 14, 1910) does not and was not intended to authorize their use to control the speed of moving trains. Senate Report No. 250, February 18, 1910.

5. A statute "directing a thing to be done in a certain manner implies that it shall not be done in any other manner." Potter's Dwarris on Statutes and Constitutions, p. 228, note 30, and cases cited.

QUESTION INVOLVED.

Does the safety-appliance act prohibit and make unlawful the use of the common hand brake in controlling the speed of a train on an interstate highway?

The facts upon which this case is predicated, as set forth in the complaint and stipulation, are, briefly:

Each of the 12 trains in question had its speed controlled by the use of hand brakes between Cascade Tunnel and Merritt in the State of Washington on the line of the defendant in error's railroad, which railroad was engaged in interstate commerce; and

Each of the 12 trains in question was equipped with power or train brakes, 85 per cent of which were connected up and used in connection with the hand brakes in controlling the speed thereof.

In other words, the *speed of the train was not controlled* by the use of the power or train brakes operated by the engineer of the locomotive drawing such train, but by the hand brake assisted by the power brake, or by the power brake assisted by the hand brake; that is, its speed was not controlled "without requiring brakemen to use the common hand brake for that purpose."

PURPOSE AND INTENT OF CONGRESS.

The purpose and object of a law is the key to its interpretation.

The purpose and object of the air-brake provision of the safety-appliance law was to remove the

menace to trainmen resulting from their presence on tops of cars to manipulate the hand brake.

As the purpose of the coupler provision was to keep employees from the danger of going between cars to couple or uncouple them, so the object of the train-brake provision was to keep men from going on the tops of cars to set hand brakes.

A train brake operated by the engineer was substituted for the hand brakes operated by the train crew. To be sure the car brake or hand brake could still be used when the car was isolated or separated from the train, but whenever cars were joined together and attached to the locomotive for hauling or movement so that a train existed, then the braking was to be done by the train brake operated by the engineer. That such was the purpose and object of the train-brake provision is made clear from the legislative history of the act to which we are at liberty to refer.

House bill No. 9682, reported favorably by the House Committee on Railways and Canals on August 25, 1890, contained practically the same provision relative to the control of the speed of trains as does the present law, and in its report that committee said:

> The object of this bill, as partly set forth in its title, is to require those using railroad cars in the work of interstate commerce to so equip the cars with such safety or automatic safety couplers as will not require trainmen to go between the ends of the cars

> to couple or uncouple them, *or to go on top of the cars to use hand brakes in controlling the speed of trains, as it is now the general custom to do, resulting in such serious consequences, as shown by the following statements.* (H. Rep. No. 3014, 51st Cong., 1st sess., p. 1.)
>
> Now, when it is remembered that of the thousands of brakemen injured and killed yearly, not 1 per cent of these are injured in coupling passenger cars or of handling brakes on such cars, simply because these cars have brakes controlled by the engineer, and when also it is now well known that automatic couplers and power brakes are as practically applicable to freight as to passenger cars (p. 5).

The House Committee on Interstate Commerce, before which was advocated a provision "to obviate the necessity of men traveling on tops of cars to handle the hand brakes in controlling the train," in favorably reporting House bill No. 9350, which bill is the present law, said:

> The number killed in falling from trains and engines was 561, and the number injured was 2,363; that is to say, 38 per cent of the total number of deaths and 46 per cent of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger would largely reduce the total losses of life and limb.

REMEDY SUGGESTED.

It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of the men going between the cars, and *continuous train brakes* that can be operated from the locomotive and *dispense with the use of men on the tops of the cars;* that the locomotive should be provided with power driving-wheel brakes, rendering them easy of control. (H. Rep. 1678, 52d Cong., 1st sess., p. 3.)

The brakes *now* have to be largely operated by the brakemen, traveling over the tops of the cars by night and day, through sleet and rain, exposed to great danger of falling from the cars, *or from overhead obstructions.*

But with the *train brake* that can be immediately applied to the entire train, the *necessity* of their going on *top of the cars* is *obviated* and a great measure of safety to all who travel will be brought into general use; for when the rails are in constant use by passenger and freight trains, indiscriminately running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike. No opposition has been heard to this requirement. [Our italics.]

Hon. Shelby M. Cullom, of Illinois, chairman of the Committee on Interstate Commerce, who favorably reported the bill and had charge of it on the

floor of the Senate, explained this feature of the bill as follows:

> Senator CULLOM. The purpose of the committee in this bill is simply to provide for a uniform coupler and for an air brake about which there shall be no particular controversy. When we get the cars of this country equipped with uniform couplers, with air brakes, so that the men will not be required to go between the cars, *so that the men who are on top of the cars to-day will be taken off and thereby relieved from the danger of such positions*, there will be no occasion for any further legislation on the subject, in my judgment. (Cong. Rec., Feb. 8, 1893, p. 1381.)
>
> Senator CULLOM. * * * Here are some further statistics of the number falling from trains and engines. With reference to that, I desire to say that there is a provision in the bill *looking to getting rid of the necessity of trainmen standing upon the tops of cars and running from one car to another to turn the hand brakes.* One purpose of the bill is to *get rid of the necessity for the men to go on the tops of cars* and to *run from one to another*, as well as to provide against the necessity of the switchmen going in between the cars to couple and uncouple. There are some statistics on the subject of falling from trains and engines. [Our italics.]

Senator McPherson, of New Jersey, explained this provision of the law in these words:

> Senator MCPHERSON. * * * Section 1 provides that there shall be power applied

> to the engine which will enable a train to be controlled by a brake, so that in a season of the year like the present, when the cars are covered with ice, *a brakeman shall not be required to run from one end of the train to the other, and in that way endanger life and limb, for the purpose of braking the train. Now, that is a very proper provision.* (Cong. Rec., Feb. 10, 1893, p. 1500.) [Our italics.]

In referring to the act in its eleventh annual report, the Interstate Commerce Commission makes this statement:

> The first section prohibits a carrier from hauling a train in interstate traffic which is not controlled by train brakes. * * * The requirement, therefore, is not that a carrier shall equip its cars with the brake or the coupler, but that it shall not use in interstate traffic a train which is not controlled by the train brake. * * * (11 Ann. Rep. I. C. C., p. 129.)

Again, in its Thirteenth Annual Report, the Commission said:

> It is believed that the number of killed and injured by falling from trains must be very largely reduced when the train brake comes into general use. The men will not then be obliged to use the tops of the cars for braking, nor to walk on the running boards. The freight train will be as completely under control of the engineer as passenger trains are at the present time. The number of

> killed and injured from this cause is as great as, if not greater, than the number of killed and injured in coupling and uncoupling cars (p. 55).

In its Fourteenth Annual Report, again, the Commission said:

> In last year's report mention was made of the large number of persons killed or injured by falling from trains. The casualties from this cause during the year ending June 30, 1898, were: Killed, 473; injured, 3,859. For 1899 the fatal accidents were 459, as compared with 644 for the year 1893. The injuries not fatal were 3,970, as compared with 3,780 for the year 1893. It is believed that the accidents resulting from falling from trains will be greatly reduced in time through the general use of the train brake. (14 Ann. Rep. I. C. C., pp. 78 et seq.)

In judicial decisions upon this section of the safety-appliance act there are found expressions of opinion which justify the position of the plaintiff in error that the purpose and object of the power or train-brake provision of the statute was aimed at the danger to men going on the tops of cars to manipulate the hand brakes.

Circuit Judge Knapp in *The Virginian Railway Company* v. *The United States* (223 Fed., 748), a case involving the identical issue raised in the instant case, in the course of his opinion said:

> In our judgment the legislation here considered manifests the plain intention of Con-

gress to require the control of trains in ordinary line movement by the train brakes prescribed and to make unlawful the use of hand brakes for that purpose. True, the use of hand brakes is not in express terms prohibited, but this is the necessary implication of the language used, and it admits of no other reasonable construction. It was the evident purpose of the train-brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep employees from going between cars, so the object of the train brake is to keep employees from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation, as the courts have repeatedly said.

It is sufficient to add that the views herein briefly expressed are supported by numerous decisions construing the analogous language of other sections of the safety-appliance law: *United States* v. *C. N. W. R. R. Co.*, 157 Fed., 321; *Atlantic Coast Line* v. *U. S.*, 168 Fed., 165; *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 198 Fed., 637; *Delk* v. *S. L. & S. F. R. R. Co.*, 220 U. S., 580; *Southern Ry. Co.* v. *U. S.*, 222 U. S., 20.

In *Erie Railroad Co.* v. *United States* (197 Fed., 287), the court said of this act:

Its purpose was to compel railroads to *equip trains in interstate transit with air brakes*, thereby contributing not only to the safety of passengers and crews, *but saving*

> *brakemen*, as far as possible, *from the dangers incurred in manipulating hand brakes.* [Our italics.]

And later in the course of that opinion its purpose is referred to as "to obviate as far as possible the danger to men working hand brakes on icy footings."

Judge Hazel, in *United States* v. *Grand Trunk Railway of Canada* (203 Fed., 775), cited with approval in 237 U. S., 402, in construing this provision of the law, said:

> The statute, which is broadly phrased, does not contain any exceptions or specifically refer to yard movements or switching movements or to *any conditions under which such power brakes are not required to be controlled by the engineer*, * * *.
>
> There is no appreciable hardship to the defendant in requiring compliance with the provisions of the act, *which obviously was passed to minimize dangers and risks to which brakemen* and switchmen *are subjected.* [Our italics.]

As the court said in *Atchison, T. & S. F. Ry. Co.* v. *United States* (198 Fed., 637), also cited with approval in 237 U. S., 402, with reference to a movement of a train without air brakes being operative within terminal limits:

> But, in our opinion, Congress, in requiring a train to be "so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed with-

> out requiring brakemen to use the common hand brake for that purpose," employed the word "brakemen" generically as including any and all men, whether specifically known as "conductors" or "brakemen" or "yard foremen" or "switchmen," whose duties in connection with the train would oblige them to use the common hand brakes in the absence of air brakes, and *intended that the engineer should be able to "control the speed"* and bring quickly to a standstill a train moving slowly through a congested region of drawbridges and railroad crossings as well as a train moving rapidly on a single clear track in the country. * * * and the dangers to the men engaged in moving those cars and to the interstate traffic itself were at least as imminent as the dangers on the "road."

In the case of *The United States* v. *Chicago, Burlington & Quincy Railroad Company* (237 U. S., 410), Mr. Justice Van Devanter, in the course of the opinion, said:

> Giving effect to the views quite recently expressed in *United States* v. *Erie Railroad Company*, ante, p. 402, we think these trains came within the air-brake requirements, which the amendatory act of 1903 declares "shall be held to apply to all trains * * * on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. The work in which they were engaged was not shifting cars about in a yard or on isolated tracks devoted to switching operations, but

> moving traffic over a considerable stretch of main-line track—one that was a busy thoroughfare for interstate passenger and freight traffic. Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect. That they carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated.

Now, what are these "dangers" which Congress had in mind and to which the courts refer?

They were clearly the dangers of falling or being thrown from the cars; from passing over the tops of cars, ice covered, or in the dark to reach the hand brakes on different cars; the passing over cars of different heights; being struck by overhead obstructions, such as bridges, tunnels, etc.

When coupler conditions of a car *necessitate* the presence of employees between cars to couple or uncouple them, the act is violated.

So when brake or train conditions require the presence of men on top of the cars to manipulate hand brakes to control the speed of the train, the act is violated.

The literal provisions of the act are so similar in the coupler and air-brake provisions that a similar

construction of the air-brake clause to that familiar now in the interpretation of the coupler section seems to be logically necessary.

The purpose of the act to take men from the tops of the cars while in trains, can not be qualified or limited or restricted.

Any such qualification or limitation would nullify, to a large extent, the purpose of Congress in legislating for the purpose of taking men off the tops of the cars.

No court should interpret the act to permit, to any extent, the existence of the dangers which Congress intended to eliminate.

CONTEMPORANEOUS CONSTRUCTION.

In its Seventeenth Annual Report, in speaking of the amendment of 1903, which required that at least 50 per cent of the train or power brakes in each train should be operated, the Commission said:

> At the same time the railroads are in no way relieved from the obligation to have a "sufficient" number of "air cars" on every train. In cases where, because of steep grades or high speed, safety requires more than the 50 per cent specified in the amendment, the railroad is responsible, in accordance with the terms of the original law, for the use of enough power brakes to insure efficient control of speed without hand brakes. (17 Ann. Rep. I. C. C., p. 84.)

It is respectfully submitted that this construction of the act, made by the Interstate Commerce Com-

mission, while not conclusive upon the courts, is entitled to consideration and should be supported unless it is clearly and plainly an erroneous interpretation.

The contemporaneous construction of a statute by those charged with the duty of executing it is "entitled to very great weight." (White, Justice, in *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290–370.) Such construction is entitled to "most respectful consideration that ought not to be overruled without cogent reasons." (Swayne, Justice, in *United States* v. *Moore*, 95 U. S., 763.)

The rule is also stated in the following cases:

Heath v. *Wallace*, 138 U. S., 582.
Merritt v. *Cameron*, 137 U. S., 552.
United States v. *Pugh*, 99 U. S., 269.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret." (Justice Swayne in *United States* v. *Moore*, *supra*.)

"It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect." (Chief Justice Waite in *United States* v. *Pugh*, *supra*.)

"Moreover, if the question be considered in a somewhat different light, viz, as the contemporaneous construction of a statute by those officers of the Government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." (Justice Lamar in *Heath* v. *Wallace, supra.*)

The following cases also follow the rule with respect to contemporaneous construction:

Edwards' Lessee v. *Darby*, 12 Wheat., 210.
Brown v. *United States*, 113 U. S., 586.
Pennell v. *Philadelphia & Reading Ry. Co.*, 231 U. S., 675.
Delano, et al., Receivers of Wabash R. Co., v. *United States*, 220 Fed., 635.

The safety-appliance act as amended applies to all trains and cars used on any railroad engaged in interstate commerce.

The safety-appliance act applies to all cars and trains operated by carriers of interstate commerce over an interstate railroad, and the act makes uniform regulations affecting all railroads and parts of railroads in all the States. It establishes only one system, applicable alike to all interstate railroads throughout the whole country.

In the case of *United States* v. *Erie R. Co.* (237 U. S., 402) Mr. Justice Van Devanter, delivering the opinion of the court, said:

> The first section makes it unlawful, among other things, for a railroad company engaged in interstate commerce "to run any train" in such commerce without having a sufficient number of the cars so equipped with train brakes—commonly spoken of as air brakes—that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." * * * The act of 1903, by its first section, provides that the requirements of the original act respecting train brakes, automatic couplers, and grab irons shall be held to apply to "all trains" and cars "used on any railroad engaged in interstate commerce," * * *.
>
> It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision.
>
> * * * Thus it is plain that, in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling

> their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should "be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains.

Again, in the case of *United States* v. *Chicago, B. & Q. R. Co.* (237 U. S., 410), Mr. Justice Van Devanter said:

> Giving effect to the views quite recently expressed in *United States* v. *Erie Railroad Company,* ante, p. 402, we think these trains came within the air-brake requirement, which the amendatory act of 1903 declares "shall be held to apply to all trains * * * on any railroad engaged in interstate commerce." According to the fair acceptation of the term they were trains in the sense of the statute. * * * Every condition suggested by the letter and spirit of the air-brake provision was present. And not only were these trains exposed to the hazards which that provision was intended to avoid or minimize, but unless their engineers were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect.

In *Southern Railway Company* v. *Crockett* (234 U. S., 725), Pitney, Justice, delivering the opinion of the court, said:

> We deem the true intent and meaning to be that the provisions and requirements re-

> specting *train brakes,* automatic couplers, grab irons, and the height of drawbars shall be extended to all railroad vehicles used upon any railroad engaged in interstate commerce, and to all other vehicles used in connection with them, so far as the safety devices and standards are capable of being installed upon the respective vehicles.

As was said by Mr. Justice Van Devanter in *Southern Railway Company* v. *United States* (222 U. S., 20)—

> the act of March 2, 1903 (32 St., 943, ch. 976), amended the earlier one and enlarged its scope by declaring, *inter alia,* that its provisions and requirements should "apply to all trains, locomotives, tenders, cars and similar vehicles used *on any railroad engaged in interstate commerce,* and in the Territories and the District of Columbia and to all other locomotives, tenders, cars and other similar vehicles used in connection therewith." [Our italics.]

Use of hand brakes to control speed of trains unlawful.

The only use of a brake is to control speed. When hand brakes are used their application is for the purpose of controlling speed. The act requires speed of trains to be *controlled* by the engineer. When speed of a train is controlled by a cooperation of engineer using air brake and brakeman using hand brake, by requirement of the carrier, the act is violated as much as if a combination of link-and-pin and automatic couplers were in required use.

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The words "*without requiring brakemen to use the common hand brake*" to control the speed of the train were not made a part of the statute without meaning. These words indicate the congressional purpose by the act to prevent and make unlawful the use of the hand brake.

The word "*without,*" in this section of the statute, signifies *an absolute exclusion*. The exclusion of the requirement of the use of the common hand brake to control the speed of a train is thus manifest from the literal wording of the act. By the obvious meaning of these literal terms the carrier is excluded from requiring brakemen to use the common hand brake for the purpose of controlling the speed of trains. The braking of trains was intended to be exclusively by the power brakes operated by the engineer.

When the engineer gives the whistle for *hand brakes*, the brakemen are "required" to use the hand brakes to control the speed of the train, and the law is violated.

In *United States* v. *Pere Marquette R. Co.* (211 Fed., 220, 223), cited with approval in *U. S.* v. *Erie R. Co.* (237 U. S., 402), Sessions, D. J., said:

> Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car-coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed,

in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required, the only difference being that in the one the unit is a train or combination of cars and in the other a single car.

In the case of the *Virginian Railway Company* v. *The United States* (*supra*) it was said:

> It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used.
>
> On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification which in any way related to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make. The peculiar and unusual conditions which existed on this section of defendant's road can not be permitted to excuse an avoidance of the positive requirements of the act. Moreover, those conditions disclose no emergency or extraordinary difficulty. They simply show that the defendant, for the sake of convenience or economy, deliberately ordered the use of hand brakes in the daily and customary operation of its trains. The justification set up is that trains of 100 cars can not be moved on this stretch of track at the slow

> speed of 10 miles an hour or less and kept under safe control with the use only of the prescribed power brake. But those operating conditions, which occasioned the need of hand brakes, are evidently of defendant's own creation. All it has to do to comply with the law is to make up trains of such smaller number of cars as can be safely and properly handled without resorting to the use of hand brakes. In short, the mandate of the Congress is disregarded in this instance, not because compliance involves any physical difficulty which is inherent or or practically serious, but merely because it involves some increase of expense. It is too plain for argument that no such reason can serve to condone disobedience to the command of the statute.

The statute in its literal terms makes mandatory the *use and operation* of the train-brake system on all trains on any railroad engaged in interstate commerce.

Section 2 of the amended act, March 2, 1903, specifically says, "and all power-brake cars in such trains which are associated together with the said 50 per centum (now 85 per centum) *shall have their brakes so used and operated,*" i. e., used and operated by the engineer of the locomotive drawing such train.

In the case of *New England Railroad Company* v. *Conroy* (175 U. S., 323), Mr. Justice Shiras in delivering the opinion of the court clearly indicated that under the provisions of this statute,

brakes that control the speed of the train should be applied by the engineer and not by brakemen or switchmen. He said:

> * * * the engineer, as railroads are now operated, is a much more important functionary in the actual movement of the train, when in motion, than the conductor. *It is his hand that regulates the application of the brakes that control the speed of the train*, and in doing so he acts upon his own knowledge and observation and not upon the orders of the conductor. Particularly has this become the case since the introduction of the air train brake system. We can take notice of the act of March 2, 1893 (27 Stat. at L., 531), which enacted:
>
> "* * * it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."
>
> We do not refer to this statute as directly applicable to the case in hand, *but as a legislative recognition of the dominant position of the engineer.* [Our italics.]

Attention is again directed to the opinion of the Circuit Court of Appeals for the Fourth Circuit in the case of *The Virginian Railway Company* v. *The United States,* from which the following is quoted:

> In our judgment the legislation here considered manifests the plain intention of Congress to require the control of trains in ordinary line movement by the train brakes prescribed and to make unlawful the use of hand brakes for that purpose. True, the use of hand brakes is not in express terms prohibited, but this is the necessary implication of the language used, and it admits of no other reasonable construction. It was the evident purpose of the train-brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep employees from going between cars, so the object of the train brake is to keep employees from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation, as the courts have repeatedly said. For example, in *Erie R. R. Co.* v. *U. S.*, 197 Fed., 287, where it was held that the train-brake requirement does not apply to switching movements in railroad yards, the court took occasion to say of the act:
>
> "Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving

brakemen, as far as possible, from the dangers incurred in manipulating hand brakes."

The whole argument of plaintiff in error rests upon the proposition that, since the statute requires that all cars be equipped with hand brakes and does not expressly forbid their use for controlling the speed of trains, there is left to "the judgment or discretion of the men operating the trains the decision as to when and under what circumstances the power brake should be used, and as to when and under what circumstances the hand brake should be used." The proposition is also stated in this form:

"The object of Congress was evidently that the automatic power brakes should be used to control the speed of the train at all times when good railroad practice would require the use of such brakes, and to permit the use of hand brakes under such circumstances as, in the judgment of the people in charge of the operation of the trains, would promote the safety of the operation."

It is obvious that such a construction would practically nullify the train-brake requirement and take all effective meaning from the provision which makes it unlawful to run "any train" unless the locomotive and cars are so equipped that the engineer can control its speed "without requiring the brakemen to use the common hand brake for that purpose." The contention must be rejected as clearly unsound. It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified

> in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves to decide when and under what circumstances those appliances should be used.
>
> On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification which in any way related to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make.

The decision of the court below states:

> If prohibited at all the use of hand brakes is only prohibited by implication; but crimes are not defined or created in that way.

But we are not dealing with a criminal offense or a criminal statute. And the implication which the Government urges is one that arises naturally from the express words of the act.

In the course of the opinion of the court below the following also appears:

> As already stated, Congress has sought to obviate the necessity for going upon trains to use hand brakes to control their speed by requiring the use of certain equipment and has imposed penalties for failure to furnish that equipment.

If "Congress," as Judge Rudkin says, "sought to obviate the *necessity* for going upon trains to use the hand brakes," then the act indicates that its *purpose* was to prevent such use of the hand brakes.

A carrier may not require the brakemen to assume the peril which it was the purpose of the act to prevent.

Congress did not legislate against the *necessity* to use the hand brakes and leave lawful and compulsory the assumption of the peril which the act by its express words was intended to obviate.

This is not a case where the purpose of the legislature is not apparent from the language used. The words employed indicate the legislative purpose that brakemen should not be required to operate the hand brakes. There is no failure of the words of the act to make clear the legislative purpose. It is not at all like the case of *Rex* v. *Shone* (6 East, 518), in which Lord Ellenborough said: "We can only say of the legislature *quod voluit non dixit.*" In this case Congress said it. It clearly expressed its condemnation of the use of the dangerous hand brakes. This stands forth clearly in the strong terms of the section of the act now under consideration.

The section is not to be construed as if it *ended* with the provision as to the control of the train by the engineer. Congress, in the use of the words which followed, was not merely recording its purpose, was not expressing an explanation or apology for what went before, but was still legislating against the particular danger at which the section was wholly aimed.

It is not a fair construction of this section to say that it legislates against the means by which danger exists and that its mention of the danger itself was without purpose or intention to legislate upon that subject. Is it to be fairly assumed from the language used that Congress, in its anxiety to keep the men off the cars in the use of the hand brake, made unlawful the nonuse of power brakes, and that the requirement of the use of the hand brake was still to be lawful? If the requirement of the use of the hand brake was still to be lawful, why make unlawful the nonuse of the power brake? The nonequipment with the power brake was made unlawful because such nonequipment was a temptation to the use of the hand brake. Can it reasonably be held, when the whole section is taken together and considered as a whole, that the legislation was directed solely against the *necessity* for the use of the hand brakes and that the *actuality* of their use was to remain legal and permissible?

If lack of statutory *equipment* is made unlawful because it *tends* to require brakemen to operate the hand brakes, by so much more it is evident that Congress intended to make unlawful the requirement itself that brakemen should operate the hand brakes. The "essence of the thing required to be done" was not particular equipment, but keeping brakemen from the tops of cars in the use of the hand brakes.

Two special forms of accidents to railroad employees were particularly in the legislative mind.

These were accidents from "falling from cars" and from "coupling cars." This stands out clearly in the language of the act, in the testimony before the legislative committees in the hearings before the bill was reported, and in the reports of the committees before the bill became a law.

The following table compiled from the Accident Bulletins of the Interstate Commerce Commission, shows the number of employees killed and injured, caused by falling from the roofs of box cars while setting hand brakes:

Year.	Employees.	
	Killed.	Injured.
1902	27	232
1903	25	370
1904	44	412
1905	27	364
1906	32	454
1907	37	472
1908	23	434
1909	25	430
1910	22	543
1911	37	512
1912	25	639
1913	28	765
Total (12 years)	352	5,627

It was to *prevent* such deaths and injuries that the act was passed. It was recognized by Congress that the provisions of the common law failed to prevent these particular accidents, and therefore its somewhat stringent provisions were enacted into law to prevent accidents and to save lives.

The terms of the act itself show that it has a "broader scope" than "merely the regulation of the character of appliances to be used." This is the construction of the act which is deducible from the *Johnson case* (196 U. S., 1); the *Taylor case* (210 U. S., 281, 294); the *Schlemmer case* (205 U. S., 1), and from the general current of judicial authority in this country.

Let us proceed with a study of the act itself. It is provided that power brakes shall be "*sufficient*," so that men may not be required to go on the tops of the cars to operate hand brakes. It is provided that couplers shall couple automatically, so that it may not be necessary for men to go between cars. These provisions must be given similar construction. Can anything be clearer than the particular intention of Congress to prevent by these provisions and requirement of men to go on top of cars to operate hand brakes and to go between cars to couple them? These were the specific dangers legislated against. These were the particular dangers the legislation was intended to prevent. These provisions are to be given like construction. No good reason can be asserted for the application of a different rule in the construction of the power-brake provisions than that which has been applied to the coupler provision. The obligation imposed by section 1 of the original act, that the power brakes shall be sufficient so that brakemen need not be required to go on the tops of cars to operate the hand

brakes, is not in the least degree modified, affected, or impaired by the provision of section 2 of the amended act fixing a minimum of the cars in a train the power brakes of which shall be operative.

Section 3 of the amended act provides:

> Nothing in this act shall be held or construed to relieve any common carrier * * * from any of the provisions, powers, duties, liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act, apply to this act.

By virtue of this section no construction is permissible which suggests repeal of any of the provisions of the first section by implication. Congress clearly expresses its intention not to repeal any of the "liabilities or requirements" of the former act.

Furthermore, there is no logical conflict between a provision that power brakes shall be sufficient to enable the engineer to control the speed of the train and a provision fixing a minimum of power brakes in a train. It is to be noted that the percentage of power-braked cars in any train required by the act is required as a *minimum* and not as a standard. Congress had some reason to declare the percentage required by the act to be a minimum and not a

standard. If a lower percentage of power-braked cars in a train were sufficient, it would still be a violation of law, because not up to the minimum. But if the minimum was not *sufficient* to enable the engineer to control the speed of the train without requiring men to go upon the cars to operate the hand brakes, the statute is violated. No other construction is admissible if the proper meaning is attributed to the word "minimum" used by Congress. No other meaning or construction is admissible to carry out the manifest intent of Congress.

Both provisions indicate the congressional intent to require the taking of trainmen off the tops of the cars to operate hand brakes. To hold that at an attempt to make more specific a requirement of power-brake operation, and more surely to provide against the necessity of men operating hand brakes on the tops of cars, could operate as a repeal of the provision against such operation of the hand brakes, would be an interpretation hostile to the legislative intent. No purpose can be asserted for the fixing of a minimum of power-braked cars, except the purpose declared in section 1 of the earlier act, to make unnecessary the requirement of the operation of the hand brakes. The congressional intent is the guide for judicial interpretation.

To make an interpretation that acts are lawful which Congress has twice indicated its purpose to restrain would be unjustifiable in the extreme. The language of both acts could have been clearer, but in both the legislative intent is manifest. In

the general current of judicial authority on this act, so far as it has been interpreted by the courts, the intent of Congress has been relied upon, and a line of judicial decisions on the subject of the coupler provisions has had the effect of cutting down the large number of deaths and injuries resulting from coupler accidents. The figures on this subject are startling and must give great satisfaction to every court which has contributed to this beneficent result.

The train-brake provision, if judicially supported in the same manner, will cut down the number of fatalities resulting from trainmen falling from the tops of cars, which number is large and alarming, and will be a source of gratification to every court which may aid in bringing about this laudable result.

This can be done by approaching the subject on broad lines, carrying out the manifest intent of the Congress, and by disregarding, in the construction of a humane remedial statute, those merely technical rules of statutory construction which had their basis originally in a judicial effort to save life when death was the sentence under most penal statutes.

The humanity of judges established the strict and technical rules of statutory construction. Humanity and the desire to save human life may justify broader rules of construction of an act intended to save the lives of brave men in a particularly hazardous and useful calling.

In *Johnson* v. *Southern Pacific Co.* (196 U. S., 1), Chief Justice Fuller held that the test of compliance with the act was whether or not it was necessary for a man to go between the ends of the cars to effect couplings and uncouplings between them. He said:

> The risk in coupling and uncoupling was the evil sought to be remedied, and that risk to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning" (p. 19).
> * * *
> In the present case the couplings would not work together. Johnson was obliged to go between the cars, and the law was not complied with (p. 20).

To apply the construction of section 2 as made by Chief Justice Fuller in the *Johnson case,* and its application is unquestionable, it would be paraphrased thus:

> The test of compliance with the act is whether or not brakemen were required to use the common hand brake to control the speed of the train. The risk in going on the top of cars to use the hand brakes was the evil sought to be obviated by the use of the train brakes operated by the engineer. True,

> no particular design of power brakes was required, but whatever the devices used, they were to be effectively sufficient for the engineer to control the speed of the train without requiring brakemen to use the common hand brake for that purpose. Congress was not paltering in a double sense, and its intention is found "in the language actually used," interpreted according to its fair and obvious meaning. In the present case the railroad was satisfied that there was a lack of sufficiency in the power brakes for the ordinary freight traffic. As the same was made up in heavy trains on the descending grade and required the speed of the train to be partially controlled by hand brakes to supplement the power brakes, the brakemen were required to use the hand brakes to control the speed of the train, and the law was not complied with.

If the power brakes were "sufficient" to control the speed of the train, the requirement that brakemen also use the common hand brake for that purpose was placing these men in the very danger that Congress legislated against, and is a violation of the act. To hold otherwise would be to hold that Congress did not legislate against the danger, but only as to equipment.

If equipment be the sole requirement, the provision as to the control of the speed of the train by the engineer is surplusage. The legislation is specific that the control of the speed of the train shall be in the hands of one man—the engineer. This

expressly negatives any legislative intention to permit the speed of the train to be controlled otherwise.

Control of the speed of the train by the engineer is clearly defeated if train brakes are set and released under orders from the conductor.

If the power brakes were not "sufficient to control trains" on such grades as those from Cascade Tunnel to Merritt, and the brakemen were required to aid in the control of the train with the common hand brakes, then the law was clearly violated.

That the railroad acted upon the belief that power brakes were not sufficient is a fact from which some evidence may be inferred that the power brakes were not sufficient. If power brakes were not sufficient, the statute was clearly violated.

If the power brakes were sufficient, the men were unnecessarily imperiled in violation of the clear intent and purpose of Congress in passing the act.

The first section of the act was framed for the purpose of obviating the necessity of brakemen going on the top of the cars to operate hand brakes. This was the specific danger legislated against. This purpose stands forth clearly from the language of the act. The implication is irresistible that Congress intended to make illegal the requirement that brakemen should go on the top of cars to operate hand brakes. Any construction that such use of the hand brakes is not illegal defeats the evident and manifest purpose of Congress. It also deprives those injured by falling from cars

when required to operate hand brakes of the advantages of the remedial provision of the act, especially of that provision abolishing the assumption of risk.

Furthermore, such a construction permits the continuance of the peril which the act sought to abolish. It places human life in jeopardy and defeats the humane purpose of Congress. It leaves the first section of the act, to comply with which the railroads expended millions, without any reason or purpose for its enactment.

The purpose of the law was to enable the speed of the train to be controlled solely and exclusively by the engineer through the use of train or power brakes, and to avoid the necessity of trainmen going upon the tops of the cars to operate the hand brakes. It is the duty of the railroad to comply with the provisions of this law. This duty is mandatory and absolute.

If it be true that on certain grades long trains of heavily loaded cars can not, with safety, be handled with the air-brake equipment available at that time and place, it becomes the duty of the railroad so to regulate the length of train and the load carried that the air or power-brake equipment at such time and place shall be sufficient for the control of such train without the use of the hand brakes for that purpose, or so to regulate or increase the efficiency or power of its air-brake equipment that the heavier loaded train may be safely handled without the use of the hand brakes to control its speed.

If the power-brake equipment, at a particular time and place, is overloaded so that the same may not be safely relied upon to control the speed of the train, the statute has been violated, and the use of the hand brakes to control the speed of the train is not justified.

IT IS THE MANDATORY DUTY OF THE RAILROAD TO MAINTAIN A PROPORTION BETWEEN ITS POWER-BRAKE EQUIPMENT AND THE LOAD IN THE TRAIN TO BE CARRIED OVER ANY PARTICULAR GRADE ON ITS RAILROAD, SO THAT AT ALL TIMES THE ENGINEER SHALL BE ABLE TO CONTROL THE SPEED OF THE TRAIN BY THE POWER BRAKES, AND IN ORDER THAT IT MAY NOT BE NECESSARY FOR THE TRAINMEN TO GO UP ON THE CARS AND OPERATE THE HAND BRAKES TO CONTROL THE SPEED OF THE TRAIN.

In the case of *United States* v. *Standard Oil Company of New Jersey and others*, 173 Fed., 177, Circuit Judge Hook, in his concurring opinion, said:

> The construction of the act should not be so narrow or technical as to belittle the work of Congress, but on the contrary it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. * * * The wisdom of a law lies in its spirit, as well as in its letter, and unless they go together in its construction and application justice goes astray. [p. 194.]

It is an ancient rule of statutory construction that "a law directing a thing to be done in a certain manner implies that it shall not be done in any other manner." (Potter's Dwarris on Statutes and

Constitutions, page 228, note 30, citing *U. S.* v. *Han Penals*, 1 Paine, 406; Dane's Abr., vol. 6, 591 to 593.)

It is clear that this act requires that the speed of trains be controlled by power brakes. Under the rule of construction just above quoted, the act forbids such control by hand brakes. Not only is the use of the hand brakes forbidden by the act by implication, from the compulsion of power brakes under the rule of construction just above quoted, but it is made expressly by the terms used at the conclusion of the first section.

The first and second sections of the act are to be given the same construction.

> The several sections of the act of Congress of 1893 (196, 27 Stat., 531), making it unlawful for railroad companies engaged in interstate commerce to use cars not equipped with certain specified appliances, are framed upon the same general plan, and notwithstanding any minor differences in their language, a declaration by the Supreme Court of the United States that one of them is intended to impose upon the carrier the absolute duty of keeping in good repair the equipment therein required, irrespective of any question of negligence, determines that a like interpretation is to be given to the others. (Justice Mason's opinion, rendered for the Supreme Court of the State of Kansas in the case of *Brinkmeier* v. *The Missouri Pacific Ry. Co.*, 105 Pac., 221.)

The second section, the construction and interpretation of which is familiar, legislates against the necessity of men going between the cars. The first section legislates against the requirement of brakemen to use the common hand brakes to control the speed of trains.

To facilitate comparison, the two provisions are set forth in parallel columns:

SECTION 1.	SECTION 2.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.	That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.

Now, bearing in mind the similarity of these sections in grammatical construction, let us examine the question in the light of judicial construction of the second section.

> * * * The object of the act, as expressed in the title, is "to promote the safety of employees and travelers; and in so far as it applies to employees engaged as brakemen on trains, it was intended to protect them from the danger of entering between cars in order to couple them up." (*U. S.* v. *Gt. Northern Ry. Co.*, 150 Fed., 229, 230.)

So it may reasonably be concluded that the first section of the act "was intended to protect them from the danger" of being required to use the common hand brake to control the speed of the train.

The highest duty of Government is to conserve the lives of the people.

Legislation conducing to this end should be liberally interpreted by the courts.

In the construction and interpretation of such laws technical and rigid adherence to the strict grammatical construction may be disregarded when necessary to carry out the manifest life-saving purpose of the legislation, if that purpose is clearly evident from the words used.

Act of April 14, 1910, requiring efficient hand brakes applies to individual cars.

It may be contended that the requirement by the statute of an efficient hand brake legalizes the use of the hand brake to control the speed of trains. But

it is important to note that the act which contains the hand-brake provision is specifically applicable to cars.

The exact language of the hand-brake section of the act is as follows:

> SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

That this section applies to individual cars, as was intended by Congress, is fully borne out by the report of Senator Elkins, from the Committee on Interstate Commerce, submitted February 18, 1910, Senate Report No. 250, Sixty-first Congress, second session:

> Another serious menace to employees has developed during recent years from the poor condition of hand brakes.

> It is now customary at a great many large terminals to switch cars by gravity in what are known as "hump" yards. In *these* situations men are required to control the speed of the *cars* by means of *hand brakes*. Because of the rapid development of air-brake equipment, the hand brake has been neglected, and when men are called upon to use it in these *exceptional situations* they find it inefficient or inoperative. As a result, employees are subjected to unnecessary risk, and many of them are killed and injured from this cause. The inefficiency of the hand brake also produces collisions between *cars* in these hump yards, and results in serious damage both to equipment and lading:

The lawfulness of the use of the hand brake to control the speed of a car or cars when segregated from a train in no manner controverts the contention that the use of hand brakes to control the speed of trains is unlawful.

And so the law may and does require the maintenance of efficient hand brakes, but this is solely and entirely for use in handling individual cars and in no manner affects the requirement that the speed of trains must be controlled by the use of power brakes by the engineer.

That the contention of the Government is sound regarding section 2 of the act of April 14, 1910, is sustained by the case of *United States* v. *Erie R. Co.*

(237 U. S., 402), wherein Mr. Justice Van Devanter said:

> It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey, it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars.

The statute made mandatory the use and operation of power brakes by the engineer of the locomotive drawing such train when it provided in section 2 of the act of 1903, that "all power-braked cars in such train * * * shall have their brakes so *used and operated.*"

That use and operation of the power brakes are requisite and the mere equipment with power brakes

is not sufficient, is a necessary inference to be drawn from the following decisions which were based upon trains which were equipped with power brakes but not *used and operated:*

Belt Railway Company of Chicago v. *United States,* 168 Fed., 542; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 198 Fed., 637; *United States* v. *Grand Trunk Ry. Co.,* 203 Fed., 775; *United States* v. *Pere Marquette R. Co.,* 211 Fed., 220; *La Mere* v. *Ry. Transfer Co. of Minneapolis,* 145 N. W., 1068.

When used only partly to control the speed of the train and supplemented by or assisted by or in conjoint use with hand brakes, then the speed of the train is not controlled by the air brakes.

When air brakes *control, their* operation governs the speed.

When both kinds of brakes are used, it can not be said that the engineer controls the speed of the train with the power or train brakes.

The speed of passenger trains is controlled solely by the train brakes. The law is the same as to both classes of trains. Freight trains when their power brakes are maintained in efficient condition for use may be even more safely operated by the train brake alone than by any partial use of both.

CONCLUSION.

The contention of the Government is sustained—

1. By the legislative history of the act.
2. By the express words of the act.

3. By the purpose of the act to prevent injury and death of brakemen called upon to use the hand brake.

4. By the well-considered precedent in *Virginian Ry. Co.* v. *United States* (4 C. C. A.).

Respectfully submitted.

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